

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X		
EFKO FOOD INGREDIENTS LTD.,	:	
	:	
Plaintiff,	:	
	:	08 Civ. 6480 (CM)
- against -	:	ECF CASE
	:	
PACIFIC INTER-LINK SDN BHD,	:	
	:	
Defendant.	:	
-----X		

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANT'S MOTION TO VACATE MARITIME ATTACHMENT**

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## **INTRODUCTION**

Plaintiff, EFKO Food Ingredients, Ltd., (“EFKO” or “Plaintiff”) by and through its undersigned counsel, Tisdale Law Offices, LLC, respectfully submits this Memorandum of Law in Opposition to Defendant Pacific Inter-Link SDN BHD’s (“PIL” or “Defendant”) Motion to Vacate the maritime attachment issued pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure (“Rule B”). Defendant’s Motion to Vacate should be denied because: (1) this court has subject matter jurisdiction over this claim and (2) Plaintiff has sustained its burden herein to establish that it has a maritime claim against PIL. Defendant’s assertions to the contrary ignore recent case law and are unavailing. Similarly, Defendant’s prayer for Rule 11 sanctions is equally baseless.

## **FACTS**

The facts pertaining to the instant Motion to Vacate the process of maritime attachment and garnishment as against PIL are more fully set forth in the accompanying Declarations of Lauren C. Davies dated August 20, 2008 (hereinafter “Davies Decl.”), Eugeny Lyashenko dated August 20, 2008 (“Lyashenko Decl.”), Timur Bakusev dated August 20, 2008 (“Bakusev Decl.”), Oleksiy Serada dated August 20, 2008 (“Serada Decl.”) and Susannah Jones dated August 20, 2008 (“Jones Decl.”). The facts stated in the Declarations are incorporated by reference herein. In addition, this Memorandum of Law will make reference to, and discuss as necessary the facts set forth in the Declarations.

**ARGUMENT****POINT I****PLAINTIFF HAS SATISFIED ITS BURDEN  
OF PROOF UNDER SUPPLEMENTAL RULES B AND E(4)(F)**

It is well established that an order of maritime attachment will issue where the plaintiff has a claim against the defendant that is cognizable in admiralty, the defendant cannot be found in the district, property of the defendant can be found in the district, and there is no statutory or general maritime law prohibition to the attachment.” *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 444-445 (2d Cir. 2006); *see also Tramp Oil & Marine Limited v. Ocean Navigation (Hellas)*, No. 03 Civ. 5265 (LAK) 2004 U.S. Dist LEXIS 7974, at \*3 (S.D.N.Y. May 7, 2004) *citing* 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 21-2, at 470 (2d ed. 1994). Further, and as provided by the Second Circuit in *Aqua Stoli*, “an attachment may be vacated only in certain limited circumstances.” *Id.* at 444.

Thus, the Rule(E)(4)(f) hearing is not intended to resolve the dispute between the parties, but is meant to determine if the technical requirements of Rule B were met. At the Rule E(4)(f) hearing, the plaintiff is required to show why the attachment should not be vacated or other relief granted consistent with these rules. Thus, as long as the plaintiff can show that it has *alleged* a *prima facie* maritime claim, the defendant is not present in the district, the defendant’s property may be found in the district and no other statutory bar to the attachment exists, the attachment should be upheld. *See Aqua Stoli*, 460 F.3d at 445.

In this case, the Defendant moves to vacate the instant maritime attachment alleging that Plaintiff does not have a valid maritime claim that is cognizable in admiralty. Specifically, the Defendant argues that this Court has no subject matter jurisdiction over this action because “no such contract exists” between the parties. *Defendant’s Brief* at 5. To the contrary, Plaintiff has

made several good faith allegations in its Verified Complaint that these contracts were entered into and formed. Furthermore, the accompanying Declarations support these allegations. More importantly, this is an issue to be determined under English law in the ongoing London arbitration between the parties because it goes directly to the merits of the dispute between the parties and, as such, must be reserved for arbitration. *See Wajilam Exps. (Singapore) Pte, Ltd. v. ATL Shipping Ltd.*, No. 05 Civ. 7955 (GEL) 2006 U.S. Dist. LEXIS 77033 (S.D.N.Y. 2006) and *World Reach Shipping Ltd. v. Indus. Carriers Inc.*, No. 06 Civ. 3756 (NRB) 2006 U.S. Dist. LEXIS 83224 (S.D.N.Y. 2006).

Secondly, the Defendant argues that even if the contracts do exist, that there is no maritime claim upon which a Rule B attachment may be based. This is simply not true. EFKO's maritime claims arise out of PIL's breach of several contracts on CFR terms which required, amongst other maritime obligations, that the Defendant arrange for and charter a vessel to carry the cargo to its destination. *See Verified Complaint attached as Exhibit 1 to Davies Decl.* As will be shown herein and in the Declarations that accompany this memorandum, the validity of the contracts between the parties must be determined in the ongoing London Arbitration and the Defendant's breach of these contracts has given rise to a maritime claim which affords the Plaintiff the right to seek a maritime attachment against the defendant.

The Plaintiff is not required to prove its case at this stage and the Court is not required to resolve the underlying dispute between the parties. *Chiquita Int'l Ltd. and Great White Fleet v. MV BOSSE, et al.*, 518 F. Supp. 2d 589, 592-93 (S.D.N.Y. 2007); *In re Murmansk Shipping Co.*, Civ. No. 00-2354 R5, 2001 U.S. Dist. LEXIS 25227, 2002 A.M.C. 2495 (E.D.La. 2001) (*citing Cashman Equip. Corp. v. Trans Caribbean Trans. Co., Ltd.*, 1996 U.S. Dist. LEXIS 16307, 1996 WL 626294, \*2 (E.D.La. 1996)). As a matter of fact, "the Court need not, and should not, reach

the merits of the [underlying dispute] as that is properly left to the ... arbitrators to decide.” *Chiquita Int’l Ltd.*, 518 F. supp 2d at 599.

As the courts of this District have continuously recognized, “[a] detailed discussion of the merits, however, has little bearing on the motion to vacate, which is decided based on whether a prima facie claim is shown and technical requirements for attachment have been met.” *Chiquita Int’l Ltd.*, 518 F. Supp. 2d at 599, quoting *Aqua Stoli*, 460 F.3d at 445. See also *Finecom Shipping Ltd. v. Multin Trade Enters. AG.*, No. 05 Civ 6695, 2005 U.S. Dist. Lexis 25761, at \*1-2 (S.D.N.Y. Oct. 24, 2005) (GEL), wherein the court held:

[A] court’s ability to understand the merits of a dispute at an early stage is limited, and courts should be reluctant to prejudice the merits of claims based essentially on the pleadings and a sparse record consisting of a few documents, in advance of any discovery. This is particularly so when the ultimate merits will be decided not by this Court, but by an arbitration panel in another country.

The Defendant has not met its burden to prove the limited bases for vacating the attachment exist in this case and its motion should be denied.<sup>1</sup> The Defendant contests only that maritime jurisdiction is lacking and therefore concedes that the other technical requires of Rule B have been met. This Court’s potential review of the underlying claim and whether it has been waived would require it to review the merits of the dispute which is something that should be left to the forum hearing that matter. *Finecom Shipping Ltd.*, 2005 U.S. Dist. Lexis 25761, at \*1-2.

Contrary to the applicable case law, the Defendant is asking the Court to review the merits of the underlying dispute in an attempt to have the attachment against it vacated. Based on the facts presented in the accompanying Declarations, credible evidence exists to support the following:

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<sup>1</sup> The Defendant does not allege that it is subject to suit in an adjacent jurisdiction, the Plaintiff can obtain jurisdiction over the Defendant where the Plaintiff is located, or that security has been otherwise provided by the Plaintiff. See *Aqua Stoli*, 463 F.3d at 445.

1. Mr. Bell was a broker acting on behalf of Plaintiff; *Bakusev Decl.* at ¶¶ 5-13; *Lyashenko Decl.* at ¶ 5;
2. EFKO never received the alleged revocation, *Bakusev Decl.* at ¶ 15; *Bakusev Decl.* at ¶¶ 15; *Lyashenko Decl.* at ¶ 17, and, even if they had the contract was already in place and the alleged revocation was not valid; *Lyashenko Decl.* at ¶ 18-20; *Jones Decl.* at ¶¶ 16-21;
3. the offer from Defendant was accepted by EFKO; *See Jones Decl.* at ¶¶ 10-21; *Bakusev Decl.* at ¶¶ 9-14; *Lyashenko Decl.* at ¶¶ 8-10, 12-15; and
4. under English law, a contract existed between Plaintiff and Defendant. *See e.g. Jones Decl.* at ¶¶ 16-21.

The validity of the contracts is in dispute but the resolution of this dispute is a matter of English law. *See e.g. Jones Decl.* at ¶4-9. Thus, those issues are to be resolved in the ongoing London arbitration proceedings. *See Id.* This Court is, therefore, not the proper forum to interpret the validity of the contracts between the parties and it would be inappropriate for this Court to do so now. *See e.g., Finecom Shipping Ltd., supra*, 2005 U.S. Dist. Lexis 25761, at \*1 (“courts should be reluctant to prejudice the merits of claims based essentially on the pleadings and a sparse record consisting of a few documents, in advance of any discovery.”).

*Aqua Stoli* makes it clear that “[t]he determination of whether a plaintiff has a valid maritime claim is a prima facie standard.” *Chiquita Int’l Ltd.*, 518 F. Supp. 2d at 592-93 *citing Ronda Ship Mgmt v. Doha Asian Games Organizing Comm.*, 511 F. Supp. 2d 399 (S.D.N.Y. 2007). The Second Circuit “reject[ed] the reasoning of the more recent district court decisions that have engaged in a broader Rule E(4)(f) inquiry.” *See Tide Line, Inc. v. Eastrade Commodities, Inc.*, at \*11 (discussing in detail the holding of *Aqua Stoli*). The Plaintiff has adequately alleged in good faith that it has a maritime claim against the Defendant based upon the breaches of the contracts between the parties. This is all that is required of the Plaintiff at this stage of the proceedings. In any event, the declaration submitted in support of Defendant’s

motion is contradicted by the declarations submitted in support of Plaintiffs' opposition to Defendant's motion. Even if the Court were to consider all of this information, it would not be able to resolve the factual disputes between the parties at this stage.

Therefore, because the technical requirements of the Rule have been met and the Defendant has failed to satisfy its burden under the Rules as discussed herein, the Defendant's motion should be denied.

## POINT II

### ENGLISH LAW GOVERNS THIS DISPUTE

It is unequivocal that English law governs this dispute based upon the contractual agreements between EFKO and PIL as well as the nature of this motion to vacate. Despite the fact that Rule B attachments are generally procedural in nature,<sup>2</sup> whether there is a contract or claim at all is a substantive matter. *See T&O v. Lydia Mar*, 415 F. Supp. 2d 310, 314 (S.D.N.Y. 2006)(stating that "the law of the contract applies to the question of whether a claim has accrued"); *see also Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. CAMILLA*, 966 F.2d 613, 615 (11<sup>th</sup> Cir. 1992)(recognizing that although the Rules are procedural, the existence of the lien under Rule C is not created by the procedural rule but by substantive maritime law); *see further Garcia v. M/V KUBBAR, et al.*, 4 F. Supp. 2d 99, 103(N.D.N.Y. 1998).

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<sup>2</sup> It is well-established in this district that the attachment of funds is a procedural remedy, and federal law applies to procedural issues in admiralty cases. *See Dominion Bulk Int'l, S.A. v. Naviera Panoceanica, S.A.C.*, 2006 U.S. Dist. LEXIS 85616, \* 3 (06 CV 6854 (LAP))(S.D.N.Y. Nov. 21, 2006).

Further, it is well-settled that choice of law provisions in maritime contracts are valid unless a strong showing is made that they should be set aside. *Lydia Mar*, 415 F. Supp. 2d at 314; citing *Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 10-12; 92 S. Ct. 1907, 1913-1914 (1972). Choice of law provisions are considered to be the foundation of contractual agreements; thus, exceptions to enforcement are very rare because such provisions are of “far greater strategic importance” than choice of forum provisions. *Marine Oil Trading Ltd. v. M/T Paros*, 287 F. Supp. 2d 638, 645, 2003 A.M.C. 1298, 1305 (E.D.Va. 2003). The six contracts between EFKO and PIL incorporate FOSFA No 81. *Jones Decl.* at ¶ 4. “Clause 31 of FOSFA No. 81 provides that “*the construction, validity and performance*” of these contracts shall be governed by English law.” *Jones Decl.* at ¶ 4. Thus, based on the choice of law provisions contractually agreed upon between the parties, English law governs this dispute irrespective of the fact that it relates to the use of Rule B procedures. Furthermore, English law governs the dispute between the parties regarding whether the contracts were entered into in the first place. “FOSFA arbitration has been commenced, and PIL have already raised the issue of jurisdiction. It is for the FOSFA Tribunal to decide the existence of the contracts in accordance with the FOSFA Arbitration Rules and with full consideration of the witness evidence and documents.” *Jones Decl.* at ¶ 7. Given this, PIL’s argument that this case should be dismissed because the contracts do not exist are irrelevant and a matter for the arbitrators in London to decide.

### POINT III

#### **PLAINTIFF HAS A MARITIME CLAIM AGAINST PIL**

The first procedural requirement of Rule B is that a plaintiff must have a maritime claim. Thus, whether or not the Plaintiff herein has a maritime claim against the defendant is a procedural question to be determined by the Federal maritime law. English law on this point is



irrelevant and does not apply. Admiralty jurisdiction is afforded this Court under 28 U.S.C. §1333(1), which provides for original jurisdiction in “any civil case of admiralty or maritime jurisdiction.” See *Sea Transport Contractors, Ltd. v. Industries Chimiques du Senegal*, 411 F. Supp. 2d 386, 2006 A.M.C. 1076, 1082 (S.D.N.Y. January 24, 2006); see also *Stolt-Nielsen S.A. v. Celanese AG*, 430 F. 3d 567, 572 (2d Cir. 2005). To determine the boundaries of admiralty jurisdiction, courts turn to the purpose of the grant. See *Insurance Co. v. Dunham*, 78 U.S. 1, 11 Wall. 1, 24, 20 L. Ed. 90 (1871). As recently confirmed by the United States Supreme Court in *Exxon Corp. v. Central Gulf Lines, Inc.* 500 U.S. 603, 608 (1991), “the fundamental interest giving rise to maritime jurisdiction is ‘the protection of maritime commerce.’” *Id.*; quoting *Sisson v. Ruby*, 497 U.S. 358, 367 (1990); quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982). Stated another way, where “the subject matter of the contract relates to a ship in its use as such, *or to commerce* or to navigation on navigable waters, or to transportation by sea or to maritime employment it is fairly said to constitute a maritime contract.” *Ingersoll Milling Mach. Co. v. M/V BODENA*, 829 F.2d 293, 302 (2d Cir. 1987). Most recently, the Supreme Court has clarified this test even further finding that the fundamental inquiry is whether the contract has reference to maritime service or maritime transactions. *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 24 (2004).

Here, the subject matter of the dispute is immersed in the business of maritime commerce and speaks directly to maritime services and transactions. As Defendant’s brief acknowledges, these contracts are “cost and freight” contracts under which “the seller must arrange and pay for the transport of the cargo to the delivery port, but title and risk of loss transfer to the buyer when the cargo is delivered on board the vessel. The seller must obtain a vessel of the type normally used to transport the goods described in the contract.” *Daewoo et al. v. Daewoo et. al.*, 2001

U.S. Dist. LEXIS 19796, \*3 (S.D.N.Y. Dec. 3, 2001). Similarly, “a CIF (cost, insurance, freight) contract is one where, in consideration for the purchase price, the seller “is bound to arrange for the carriage of the goods to their agreed destination, for insurance upon them for the benefit of the buyer, and either to pay the cost of the carriage and insurance or allow it on the purchase price.” *Federal Ins. Co. v. Great White Fleet (US) Ltd., et al.*, 2008 U.S. Dist. LEXIS 58461, \*6 n.4 (S.D.N.Y. August 1, 2008). Here, the offer was accepted and the Defendant’s next obligation was to charter the vessel, load the cargo and to have the bill of lading issued. *See Verified Complaint* ¶¶ 4-6. These duties were breached by Defendant and it is the breach of these duties which gives rise to the damages alleged by Plaintiff. Thus, a claim for breach of a contract on CFR terms is an obligation enforceable in admiralty.

Even where there is a non maritime contract with severable maritime obligations, there is subject matter jurisdiction. This is the case because cost and freight contracts, like all other contracts, must pass the same test to be maritime. In contract cases, maritime jurisdiction is conferred where, as here, the contract touches “rights and duties appertaining to commerce and navigation.” *S.S. Eclipse*, 135 U.S. 599, 608 (1890). For the last century, the scope of maritime jurisdiction has expanded greatly but unevenly. Thus it is oft quoted that “our cases do not draw clean lines between maritime and non-maritime contracts.” *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004). Today, according to the United States Supreme Court, the standard for determining whether a particular contract is maritime is as follows:

To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. Nor can we simply look to the place of the contract’s formation or performance. Instead, the answer depends upon ... the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions.

*Kirby*, 543 U.S. at 24 (internal citations and quotations omitted). Notably, Defendant fails to consider or even refer to *Kirby* in its memorandum of law and ignores its expansion of maritime subject matter jurisdiction. The *Kirby* Court also reiterated the Supreme Court's test in *Exxon Corp. v. Central Gulf Lines, Inc.*, which states that the "fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Exxon*, 500 U.S. 603, 608 (1991)(internal quotations omitted).

More importantly, under the Supreme Court's recent tests in *Kirby* and *Exxon*, as outlined above, the contract between EFKO and PIL is a maritime contract. Specifically, it is a contract that pertains specifically to ocean transportation services, the nomination of a vessel and other maritime obligations that affect maritime transactions and services. This CFR contract is a maritime contract because it meets the United States Supreme Court's test as outlined in *Kirby* and *Exxon*. Furthermore, it has been held that where, as here, the contract pertains to maritime matters, there is subject matter jurisdiction over that maritime contract. *Rex Oil, Ltd. v. M/V JACINTH, etc., et. al.*, 873 F.2d 82 (5th Cir. 1989)(finding that where a settlement agreement contains maritime terms and, as such, pertains to maritime matters, it is maritime).

As outlined by the Second Circuit in *Folksamerica, supra*, courts are required to "make a 'threshold inquiry' into the subject matter of the *dispute* [and] '[b]efore attempting to categorize contractual rights as maritime or non-maritime, a federal court must first consider whether an issue related to maritime interests has been raised.'" *Folksamerica*, 413 F.3d at 312, (quoting *Atlantic Mutual*, 968 F.2d at 199) (internal citations omitted). In this case, it is clear that the subject matter of the *dispute* directly relates to maritime interests. The Rule B application was filed for EFKO to obtain security in aid of its then-pending arbitration in London. The

arbitration submission by EFKO seeks damages for Defendant's failure to charter the ship and load the cargo.

The relevant portions of the contract which are the focus of the arbitration and for which the Plaintiff is seeking security, give rise to admiralty jurisdiction. In *Compagnie Francaise de Navigation a Vapeur v. Bonnasse*, 19 F.2d 777, 779 (2d Cir. 1927), Judge Hand held that where the maritime obligations of a contract can be "separately adjudicated, there is no objection to the jurisdiction of the admiralty pro tanto. . . . The substantial question is whether the maritime obligations can be separately enforced without prejudice to the rest." See also *Hartford Fire Ins. Co. v. Orient Overseas Container Lines (UK) Ltd.*, 230 F.3d 549, 555 (2d Cir. 2000) ("a federal court can exercise admiralty jurisdiction over a 'mixed' contract if: (1) the claim arises from a breach of maritime obligations that are severable from the non-maritime obligations of the contract. . . .").

*Shanghai Sinom v. Exfin*, a case heavily relied upon by the Defendant, is easily distinguishable from the instant case. *Shanghai Sinom v. Exfin*, 06 Civ. 4711 (GEL)(Oct. 5, 2006), annexed to the Declaration of Lawrence J. Kahn ("Kahn Decl.") as Exhibit 5. In *Exfin*, Judge Lynch found that the plaintiff had no maritime claim because none of the maritime portions of the sales contract were breached. In *Exfin*, the contract between the parties was, as here, a sales contract which also called for the shipment of the goods by sea. Unfortunately for the plaintiff therein, the goods were successfully transported by sea and, only afterwards was the contract breached. See *Id.* Thus, Judge Lynch found that Plaintiff's had no maritime claim only because there was no allegation that the defendant therein breached any of the maritime aspects of that contract. See *Id.* at p. 5. This is not the case here. Plaintiff has made several allegations

that the maritime portions of this contract were breached by the Defendant PIL. Thus, a different outcome is warranted here.

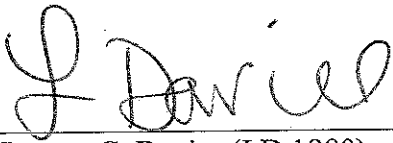
Recently, in *Noble Resources S.A. v. Yugtransitservis and Silverstone*, 08 CV 3876 (LAP), Judge Preska found that “maritime transportation was integral to the [commodity purchase and sale] agreement” and found that the contract and dispute at issue fell within the Court’s maritime jurisdiction. *See Judge Preska’s July 23, 2008 decision attached hereto as Exhibit “A,” at 2.* In addition, Judge Lynch recently wrestled with a similar contract dispute in *Noble Resources S.A. v. SARL*, 08 CV 3587 (GEL), *transcript of decision attached hereto as Exhibit “B.”* Relying on *Folksamerica, supra*, Judge Lynch noted that maritime jurisdiction can exist where the claim at issue in the dispute arises from a breach of maritime obligations that are severable from the non maritime obligations; *citing Folksamerica at p. 315.* Although noting that the contracts at issue involved the sale of goods, Judge Lynch found that the failure to pay vessel demurrage fell squarely within the Court’s admiralty jurisdiction. *See Lynch’s August 12 Decision annexed hereto as Exhibit “B.”* There, as here, the maritime portions of this commodity sales agreement were breached and maritime jurisdiction exists.

**CONCLUSION**

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that this Court deny Defendants' Motion to Vacate in all respects and grant such other and further relief as the Court deems necessary and appropriate.

Dated: August 20, 2008  
New York, NY

The Plaintiff,  
EFKO FOOD INGREDIENTS LTD.,

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**AFFIRMATION OF SERVICE**

I hereby certify that on August 20, 2008, a copy of the foregoing Memorandum of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF system.

By: 

Lauren C. Davies (LD 1980)

# **EXHIBIT “A”**



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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NOBLE RESOURCES,

Plaintiff,

v.

08 CV 3876(LAP)

YUGTRANZITSERVIS and  
SILVERSTONE,

Defendants.

-----X

New York, N.Y.  
July 23, 2008  
9:45 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

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87N6NOBL  
(Case called; in open court)

THE COURT: Counsel have very graciously agreed to prepare their papers quickly so that the hearing required to be conducted quickly on a motion to vacate a maritime attachment could take place promptly. I am grateful to counsel for doing that.

Defendant argues first that the contract at issue is not subject to maritime jurisdiction. We all agree to the law which is that the threshold inquiry examines the subject matter of dispute as opposed to the underlying contract. To determine if an issue related to maritime interests has been raised, an issue will not give rise to maritime jurisdiction if the subject matter of the dispute is so attenuated from the

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15 business of maritime commerce that it does not implicate the  
 16 concerns underlying admiralty and maritime jurisdiction.

17 As the Court of Appeals acknowledged in *FolksAmerica*,  
 18 *Reinsurance Co. v. Cleanwater New York, Inc.*, 413 F.3d 307 (2d  
 19 Cir. 2005) the court directed that the jurisdictional inquiry  
 20 be focused upon whether the nature of the transaction was  
 21 maritime and observed that the fundamental interest giving rise  
 22 to maritime jurisdiction is the protection of maritime  
 23 commerce.

24 Here, the contract itself makes clear that maritime  
 25 transportation was integral to the agreement. For example, the

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1 contract provided that Plaintiff Noble would purchase a cargo  
 2 from YTS and the contract set out in great detail the  
 3 conditions for transportation and delivery.

4 The contract set out in the portion under delivery the  
 5 window of dates open for loading in the specified port, that  
 6 portion of the contract also required that the vessel nominated  
 7 by buyers was required to tender her notice of readiness at the  
 8 designated port. It set out how the loading of the vessel was  
 9 to be effected. It set out in great detail the type of vessel  
 10 that would be acceptable, that is, "A self-trimming bulk  
 11 carrier, single-decker vessel suitable for direct loading  
 12 (wagon-board of the vessel)."

13 The Contract also provided that the vessel could be --  
 14 should be confirmed or rejected by sellers in writing and, in  
 15 fact, here the sellers rejected the first three vessels that  
 16 were nominated eventually accepting the Southgate.

17 The contract further set out the preadvise that buyers  
 18 were to give the sellers of the vessel's ETA, name, flag,  
 19 dimensions, hatches and hold dimensions and alike. It set out  
 20 in detail the loading instructions, the loading rate, detailed  
 21 the notice of readiness and the laytime and the demurrage,  
 22 among other provisions. So the underlying contract certainly  
 23 touched upon the business of maritime commerce.

24 In addition, the dispute between the parties also  
 25 touches upon the maritime commerce. As set out in plaintiff's

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1 claim submissions in the arbitration, and perhaps more  
 2 importantly as reflected in the award, the dispute centered on  
 3 two issues. First, the default by YTS in failing to provide a  
 4 berth for the vessel after she had tendered her notice of  
 5 readiness and refusal to load the vessel constituting a default  
 6 under the contract. And, secondly, a request for wasted vessel  
 7 costs, that is, the costs incurred by the vessel following  
 8 tendering of her notice of readiness.

9 As set out in the award damages were awarded for both  
 10 these items and indeed there was a lengthy discussion in  
 11 Section 6 of the award about the wasted costs incurred on  
 12 account of the vessel's lack of use because of defendant YTS's  
 13 default. The wasted vessel expenses included bunkering costs,  
 14 port and survey costs, and hire payments, all clearly within  
 15 the maritime jurisdiction.

16 For all those reasons, I find that the contract and  
 17 dispute at issue fall within the Court's maritime jurisdiction.

18 The question has also been presented as to whether or  
 19 not the guarantee by Silverstone falls within the Court's

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20 maritime jurisdiction. As the Court has set out recently in C  
 21 Transport Panamax, Ltd. v. Kremikovtzi Trade, et al., 07 CR 893  
 22 (June 19, 2008 S.D.N.Y.) courts in this circuit and elsewhere  
 23 have long held that an agreement to act as a surety on a  
 24 maritime contract is not maritime in nature. They have  
 25 recognized that the same is not true of an agreement to

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1 guarantee the performance of a maritime contract.

2 See e.g. Compagnie Francaise, DE Navigational Avapeur  
 3 v. Bonnase, 19 F.2d 777, 779 (2d Cir. 1927) (L. Hand, J).

4 Here the guarantee by Silverstone specifically states  
 5 "The guarantor (Silverstone) irrevocably and unconditionally,  
 6 A, as principal obligor guarantees to the Buyers the prompt  
 7 performance by (YTS) of all its obligations under the  
 8 Contract...." Accordingly, the guarantee at issue here based  
 9 on longstanding Second Circuit law falls within the meaning of  
 10 maritime contracts.

11 Finally, with respect to defendant's argument that the  
 12 matter is not ripe, the arbitral award has ordered that the  
 13 payment be made and it has not yet been paid. Accordingly, the  
 14 matter is ripe with respect to the guarantor. In addition, it  
 15 is most frequently the case that Rule B attachments are used to  
 16 provide security for arbitral awards and that has been the use  
 17 here. Accordingly, defendants' motion to vacate the attachment  
 18 is denied.

19 THE COURT: Is there anything else today?

20 MR. CHALOS: Yes, your Honor, two points if I may.

21 THE COURT: Sir.

22 MR. CHALOS: We thank the Court for hearing us on an  
 23 expedited basis. We would first off like to make an  
 24 application to the Court to reduce the amount of security. On  
 25 page 14 of the award, the panel clearly sets forth that the

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1 plaintiff was awarded \$3,362,400 and no more as the words of  
 2 the panel. Here the amount of the order attachment is almost  
 3 double that. It is significantly more.

4 THE COURT: What is the story with the interest,  
 5 Mr. Chalos?

6 MR. CHALOS: According to the panel, it is 7.5 percent  
 7 beginning August 16, 2007. That is only one year's worth of  
 8 interest. Surely this can be resolved in the next, I would  
 9 assume, six months or so with the upcoming appellate deadlines.

10 THE COURT: Has anyone done the calculation of the  
 11 interest?

12 MS. OROZCO: I have, your Honor. But I would just  
 13 like to speak on that point. The panel awards the amount less  
 14 than we had sought in our application, but it also awards  
 15 interest 7.5 percent from the date of the default until it is  
 16 paid and it also awards costs of arbitrator, not legal costs.

17 We have attached to date as outlined in my declaration  
 18 \$4 million. It is paragraph 34 of my declaration at page 6.  
 19 We have not calculated the interest out for a year. What we  
 20 have done is calculated it out for three years, which is  
 21 normally what we undertake in anticipating appeals and that  
 22 sort of thing. If we allow for three years of interest,  
 23 security for three years of interest, plus the costs of the  
 24 Gafta arbitration, the security that we would be entitled to

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25 would be \$4,225,000.

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1 So we are at this time undersecured by 200,000.  
2 However, if the Court wants us to reevaluate the interest, we  
3 would be willing to do so and then release the funds  
4 accordingly if that was a proper analysis.

5 THE COURT: Counsel.

6 MR. CHALOS: Those calculations are flawed. Those  
7 calculations are based on the principal claim of 3.9 million.  
8 That is not what the panel awarded. 7.5 percent on the \$3.3  
9 million award is about, 21 to \$210,000.

10 MS. OROZCO: I actually calculated the three-year  
11 interest on the amount awarded by the arbitrators, which was  
12 \$3,362,400. And the interest from August 15th, 2007 through  
13 August 15th, 2010 is \$840,000.

14 MR. CHALOS: I submit through 2010 is a bit long. I  
15 can certainly understand maybe two years, but not three.

16 Also, seeing as they are already secured from the  
17 guarantor's EFTs, I renew my application and dismiss the matter  
18 against YTS. They are secured or they are not secured. They  
19 have it already attached. There is no in rem quasi  
20 jurisdiction over the party whose funds who haven't been  
21 attached.

22 THE COURT: I don't hear counsel going out and seeking  
23 further attachments here.

24 MR. CHALOS: But they would, though. That is the  
25 point if they sought to move money. In fact, in the papers

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1 that counsel submitted last night, they said exactly that they  
2 would do that. If they wound up -- U.S. dollar transfers on  
3 behalf of Yugtranszitservis came through New York, they would  
4 catch that and release monies belonging to the guarantor.

5 THE COURT: What do you say to that, counsel?

6 MS. OROZCO: Was that was a statement that we made.  
7 That statement as made with respect to the application of the  
8 New York CPLR in that case, which we didn't address and we say  
9 we are not applied. We actually have stopped serving the writ  
10 of attachment in this case and we are no longer serving on any  
11 of the defendants.

12 THE COURT: First, I decline to reduce the amount.

13 Second, obviously counsel knows that plaintiff may not  
14 be oversecured. If, Mr. Chalos, you find that plaintiff is  
15 attaching more than the four million two number -- is that the  
16 total number? Please remind me.

17 MS. OROZCO: Yes. The total number is comprised of  
18 \$3,362,400 of principal pursuant to the arbitration award  
19 issued on July 4th, 2008, with the rate of interest calculated  
20 at 7.5 percent which is also the rate awarded for three years  
21 from August 15th, 2007 through August 15th, 2010. The interest  
22 on that amount is \$840,501.

23 In addition, the arbitration award also allowed costs,  
24 Gafta costs, to the plaintiff and the Gafta costs incurred were  
25 23,000 U.S. dollars. So the total security we would be

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1 entitled to or we would be seeking is \$4,225,901.  
 2 THE COURT: To the extent, Mr. Chalos, counsel  
 3 attaches more than that, you let me know.  
 4 MR. CHALOS: Thank you, your Honor.  
 5 Finally, your Honor, we would like to ask the Court to  
 6 certify this for immediate appeal to the Second Circuit.  
 7 THE COURT: I will take a letter on that.  
 8 How is this a complex or novel issue?  
 9 MR. CHALOS: well, it is a novel issue in the sense  
 10 that the Court has for the first time found a Gafta contract to  
 11 be within the meaning of a maritime contract and a maritime  
 12 claim under Rule B. It stands starkly in contrast to Judge  
 13 Daniels' decision as to Aston Agro as well as Judge Sullivan, I  
 14 am not sure about that, in the Tan Shan case. These exact  
 15 arguments were presented there with a 180-degree different  
 16 result and I do believe that if we can bring this to a head  
 17 Second Circuit level promptly that would help provide some  
 18 clarity on these types of issues.  
 19 THE COURT: The law is not in doubt. It is the  
 20 application, right?  
 21 MR. CHALOS: well, I think the law is in doubt in a  
 22 sense that our position is that the Court needs to look to the  
 23 primarily objective of the contract. Our argument has been  
 24 that the primary objective of the contract is one of sale and  
 25 purchase.

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1 THE COURT: I didn't see any of the Second Circuit  
 2 cases talking about the primary objective of the contract.  
 3 MR. CHALOS: well, I think we set out the argument  
 4 based on the precedent of Judge Daniels' decision, which can be  
 5 found for the Court's reference on page 3 of the Aston Agro  
 6 decision where he writes, In this case the contracts are not  
 7 maritime contracts because they are primary objective was not  
 8 the transportation of goods by sea. Instead, their primary  
 9 objective was undoubtedly the sale of wheat. That the wheat  
 10 was transported on a ship does not make the contracts maritime  
 11 contracts anymore than it would make them aviation contracts  
 12 had the wheat been shipped via airplane. Nor would the  
 13 contracts between a seller and shipper -- that is true here.  
 14 the judge in that matter goes on to write, Nor can maritime  
 15 jurisdiction be exercised under an exception to the general  
 16 rule that maritime jurisdiction "Arises only when the subject  
 17 matter of the contract is purely or wholly maritime in nature.  
 18 Under the first exception, federal court can exercise --  
 19 THE COURT: Counsel, do you want this taken down? If  
 20 you do, you better read so the court reporter can take it down.  
 21 MR. CHALOS: The Court has it before it.  
 22 THE COURT: So you don't need to read it.  
 23 MS. OROZCO: May I respond?  
 24 THE COURT: Yes, ma'am.  
 25 MS. OROZCO: The key to the quotes by defendant from

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1 the Ashon Agro case is the first line where it says, "In this  
 2 case." and further or in the quote Judge Daniels says that  
 3 based on the facts of that particular case they are not within  
 4 the maritime jurisdiction.  
 5 I would just like to point out that the Exxon case,

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6 500 U.S. 603, 612 reminds us -- this is the U.S. Supreme  
7 Court -- reminds us that courts are required to look to the  
8 subject matter of the relevant contract. And in this case the  
9 relevant contract, the Noble YTS contract, provides maritime  
10 jurisdiction.

11 MR. CHALOS: Your Honor, this is the shifting sands  
12 that I have been arguing again. The Court is required to look  
13 to the nature of the contract, not the dispute. Twenty minutes  
14 ago counsel was arguing the Court needs to look to the dispute  
15 and I rejected that. The contract is a sale and purchase  
16 contract, not a maritime contract. It is not maritime contract  
17 with third parties. We had nothing do with it. My clients had  
18 nothing to do with it. That is the dispute here. If you look  
19 to the nature and substance of the contract, we are selling and  
20 they are buying. Full stop. It is the sale and purchase  
21 contract.

22 In fact, your Honor, that was precisely what was  
23 addressed by Judge Daniels. He writes here invoking the first  
24 exception, Aston contends that maritime jurisdiction exists  
25 because the particular claims at issue involve only the

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1 maritime portions of the contracts, and it was rejected, which  
2 is precisely the argument presented by plaintiff. Our  
3 opposition is precisely the argument adopted by Judge Daniels.

4 THE COURT: The Court denies the request for  
5 certification under 28, U.S.C., Section 1292(b). The  
6 controlling law is not at all at issue in this case. Everyone  
7 agrees on the cases that should be looked to for guidance. The  
8 only dispute is the application of those cases to the facts of  
9 this case as opposed to the facts of other cases. Accordingly  
10 certification for immediate appeal is denied.

11 Anything else, counsel?

12 MR. CHALOS: Nothing further, your Honor.

13 THE COURT: Thank you, ladies and gentlemen. Thank  
14 you for your excellent arguments.

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# **EXHIBIT “B”**

# **EXHIBIT “B”**



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----X

NOBLE RESOURCES SA,

Plaintiff,

v.

08 CV 3587 (GEL)

SARL OUEST IMPORT,

Defendant.

-----X

New York, N.Y.  
August 12, 2008  
10:15 a.m.

Before:

HON. GERARD E. LYNCH,

District Judge

APPEARANCES

TISDALE LAW OFFICES, LLC  
Attorney for Plaintiff  
BY: CLAUARISSE OROZCO

CICHANOWICZ, CALLAN, KEANE, VENGROW & TEXTOR, LLP  
Attorney for Defendant  
BY: JOSEPH F. DeMAY, JR.

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(Case called)

MS. OROZCO: Good morning, your Honor. Claurisse  
Orozco from Tisdale Law Offices for the plaintiff, Noble  
Resources.

THE COURT: Good morning.

MR. DeMAY: Good morning. Joseph DeMay, Jr. from  
Cichanowicz, Callan, Keane, Vengrow & Textor for the defendant.

THE COURT: Mr. DeMay, good morning.

well, I think that what is technically before me is a  
request for a hearing on a potential motion to vacate an order  
for marine attachment. The parties have written a number of  
letters to the court regarding that. It's my impression -- and  
I think it's been confirmed by my law clerk -- that the parties  
have fully briefed the merits of the issue and that what we're

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15 really here to do today is to have oral argument towards  
16 deciding the motion to vacate the attachment.  
17 Is that everybody's understanding, or does anybody  
18 think we need more of anything?  
19 MS. OROZCO: No. That's my understanding, your Honor.  
20 MR. DeMAY: Oral argument, your Honor.  
21 THE COURT: Very good.  
22 So, I think what I'd really like to hear -- I suppose  
23 starting with the defendant as the movant -- is an account from  
24 each side of what they think is at issue in the arbitration in  
25 this case; that is, what are the factual issues and legal

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1 issues that the arbitrators had to decide.  
2 Mr. DeMay.  
3 MR. DeMAY: Your Honor, I'll confess that I was not  
4 fully briefed on the arbitral aspect of it. Our application  
5 and our retention as attorneys was directed solely toward the  
6 propriety of the maritime attachment. For that purpose, we  
7 have assumed, for argument's sake only, the validity of the  
8 arbitration award, and the accurate and true condition of the  
9 contracts of sale that the plaintiff has already provided.  
10 THE COURT: Yes. I'm not so much concerned with the  
11 merits of the arbitration. But, as I understood it, your  
12 argument is that this is really not a maritime case.  
13 MR. DeMAY: Yes, your Honor.  
14 THE COURT: And on reading the arbitration award, it  
15 seemed to me that what the arbitrators were concerned with was  
16 what, as a nonadmiralty lawyer you'll forgive me for calling,  
17 boaty things; assumed to be about what happened to the ship and  
18 why it was late and things of that sort.  
19 And I wanted to give everyone a chance to address that  
20 in case I misperceived what was the -- what is the real dispute  
21 between the parties because it sounded to me, in my landlubber  
22 way, to be a maritime kind of dispute.  
23 MR. DeMAY: Your Honor, my understanding is that what  
24 we're talking about here are essentially pricing terms. The  
25 sales contract were just that. They were contracts for the

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1 sale of sugar.  
2 Under like the contracts in Judge Preska's case, which  
3 has already been provided to you, these particular contracts  
4 made reference to the ship.  
5 They made reference to the fact that the buyer, our  
6 client, would be responsible for certain discharging costs, and  
7 they provided references to the charter party by which those  
8 costs would be calculated.  
9 My understanding, however, is that unlike the typical  
10 maritime case, our client did not assume any direct obligation  
11 toward the operation or navigation of the ship. In other  
12 words, the contract for the sale of the sugar made reference to  
13 the operation of the ship, made reference to things like  
14 demurrage. But I think the case law is fairly clear that  
15 simply making reference to those things do not give rise to a  
16 maritime obligation. The maritime obligation arises when you  
17 assume an obligation that directly relates to the operation and  
18 navigation of a ship in commerce on the high seas.

THE COURT: Well, I mean it seems to me that there

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20 are, as I've understood the case law, two different kinds of  
 21 ways in which a contract can give rise to admiralty  
 22 jurisdiction. The one is, as you say, where the contract  
 23 itself is predominantly about maritime issues. And I'd have to  
 24 agree with you, this looks more like, for example, the case  
 25 that I have that the parties cited in that it's really a

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1 contract for the sale of goods that says: well, but by the  
 2 way, it's going to be going by ship.

3 But then there is a separate issue where the claim at  
 4 issue arises from a breach of the maritime obligations that are  
 5 part of the contract. And it seemed to me that what the  
 6 parties were actually fighting about here was the maritime part  
 7 of the contract. In other words, they were concerned about  
 8 what the demurrage costs were going to be based on what  
 9 happened at sea.

10 Am I wrong about that?

11 MR. DeMAY: No, your Honor. To the extent that this  
 12 is a demurrage claim, that's absolutely correct. And the  
 13 contract does make provision for our client to reimburse the  
 14 seller for all demurrage costs that they incur.

15 But demurrage is primarily an obligation that's  
 16 incurred by the charterer, in this case the seller, to the  
 17 vessel owner. Our client, the buyer, is neither the charterer  
 18 nor the vessel owner.

19 What they did, in effect, was to say that: we, the  
 20 buyer, will indemnify or compensate you, the seller, for  
 21 whatever demurrage costs that you incur during the performance  
 22 of the charter party.

23 And think the case law is clear that unlike a  
 24 situation where somebody, say a guarantor, assumes the direct  
 25 performance and obligation to the vessel owner, where you

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1 merely take or undertake to indemnify or compensate somebody  
 2 for a maritime obligation that they have incurred, that  
 3 obligation to pay, to indemnify, is not itself a maritime  
 4 obligation.

5 It is inevitable if you've undertaken to compensate or  
 6 indemnify somebody for a maritime obligation that the dispute  
 7 will necessarily center on the details of that maritime  
 8 obligation. But, here the maritime obligation was not our  
 9 client's maritime obligation. It was first and foremost the  
 10 seller/charterer's obligation, and our client was merely called  
 11 upon to indemnify, which meant that inevitably that the details  
 12 of the charter party of the performance would have to be  
 13 raised. But that's not the same thing as saying that our  
 14 client undertook a maritime obligation, undertook to compensate  
 15 the charterer for its maritime obligations.

16 THE COURT: I see. So you're saying even if the  
 17 dispute was in substance about the facts of what occurred at  
 18 sea, that your obligation here was purely to pay whatever the  
 19 chartering party had to pay in demurrage costs?

20 MR. DeMAY: Exactly. The contract for sale set out  
 21 the way in which that compensation would be calculated. But  
 22 that is essentially the case.

23 THE COURT: Again, when you say the contract for sale  
 24 set out the way in which it would be calculated, what did the

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25 contract of sale say?

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1 Again, it seems to me that your argument works best if  
2 the contract simply says whatever the -- am I using the right  
3 terminology -- the chartering party has to pay in demurrage  
4 costs, you will reimburse, not us. And we don't care  
5 whether -- what the rights and wrongs are of that charge.  
6 whatever he gets charged, you will pay.

7 And in that event, you would not have a dispute about  
8 whether the charges were correct or about anything maritime at  
9 all. It would simply be: Here's the bill that we were  
10 presented and you better pay it.

11 MR. DeMAY: That would be the cleanest way of doing  
12 it. But in commerce, it is not unusual that the parties  
13 bargained for whatever advantage they can get. And it was  
14 certainly open to the parties in this case, in our case the  
15 buyer, to negotiate with the seller that, yes, it would be  
16 responsible for demurrage but only within certain parameters  
17 and on certain conditions.

18 So that the mere fact that they tried to cut  
19 themselves a better deal than the seller/charterer might have  
20 had with the vessel owner, I don't think changes the essential  
21 fact that they're not assuming a maritime obligation. They are  
22 assuming a payment obligation.

23 THE COURT: But the obligation then is very similar to  
24 the payment obligation that would occur if the contract simply  
25 said we're responsible for getting the ship to port and if you

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1 don't get there you pay demurrage, right?

2 I mean it winds up being the same thing. Once you  
3 incorporate the maritime issues into what has to be paid,  
4 you're essentially talking about a very maritime kind of set of  
5 issues, aren't you?

6 MR. DeMAY: Yes. The issues can be maritime. I don't  
7 think that's determinative.

8 THE COURT: I see.

9 MR. DeMAY: The question is: Are the obligations  
10 maritime? And, of course, if, as I said before, you're talking  
11 about having the buyer, having to compensate the seller, for  
12 money incurred in the performance of maritime obligations,  
13 unless the seller has somehow undertaken to directly assume an  
14 obligation to the shipowner, I don't see that it's a maritime  
15 obligation; it's simply a payment obligation that has reference  
16 to maritime issues.

17 THE COURT: I see. And that further explains why you  
18 would take the position that I really shouldn't worry very much  
19 about what the arbitrators had to do? I should just look at  
20 the contract itself to decide what the nature of the obligation  
21 is that the parties are disputing?

22 MR. DeMAY: Yes, your Honor.

23 THE COURT: Okay. That's very helpful. Thank you.

24 MS. OROZCO, what's your view?

25 MS. OROZCO: Well, clearly, I disagree with Mr. DeMay.

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1 I think that the dispute here is clearly a maritime dispute.  
 2 And I think that the case law requires us and directs us to  
 3 look at the nature of the dispute of this particular contract.  
 4 That's what the Second Circuit has directed in Folksamerica.

5 And I believe that the very dispute in this case,  
 6 which is admitted by both parties, is identified in the  
 7 arbitration award. And I think that the arbitration award is  
 8 important because it outlines and indicates what the parties'  
 9 understandings were and what their rights and obligations were  
 10 under the contract. So, I think that the arbitration is  
 11 important.

12 But before getting to the arbitration award, the  
 13 contract itself has very specific maritime provisions. Each of  
 14 the six contracts are generally the same. The only differences  
 15 being the date, the quantity of goods to be shipped, and the  
 16 vessels.

17 THE COURT: Can you point me to where in the  
 18 voluminous materials I will most easily find the contracts so I  
 19 can follow?

20 MS. OROZCO: They are -- to my letter dated July 8,  
 21 they are Exhibits 1 through 6. They are all generally the  
 22 same.

23 THE COURT: Okay. Got it.

24 MS. OROZCO: If you go to the fourth page of the  
 25 contract under discharging conditions --

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1 THE COURT: Okay.

2 MS. OROZCO: -- it specifically identifies and  
 3 specifically states that all of the discharging costs are for  
 4 the buyer's account, in this case the defendant.

5 So, there is no secret or no hidden agenda. It's  
 6 basically any discharging costs, discharging, port expenses,  
 7 demurrage incurred, any other vessel-related costs that would  
 8 be incurred are for the buyer's account.

9 More importantly, in this particular contract -- each  
 10 contract identifies the vessel, as well. So, the buyer's  
 11 already aware of the discharging terms, the conditions, the  
 12 payments they are going to incur, the vessel that is going to  
 13 be nominated, And I think what's very important is the very  
 14 last sentence says, "All of the other conditions to be in  
 15 accordance with the amended version of the Sugar Charter Party  
 16 Form 1999."

17 The arbitrators, when they were reviewing their award,  
 18 made a note at page 4 of the arbitration award, which is your  
 19 Exhibit 7, in paragraph 6. They stated and they recognized  
 20 that at the oral argument hearing during the arbitration both  
 21 parties agreed in accordance with clause 22 of the standard  
 22 sugar charter party 1999, which was incorporated into each of  
 23 the six contracts, gross weight, rather than net weight, was  
 24 relevant.

25 This statement was made for the purposes of

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1 calculating the demurrage rate. But what's, I find -- I think  
 2 is very important in this particular case is that the charter  
 3 parties were incorporated. And to the extent that the  
 4 discharging conditions in the standard form were different than  
 5 this particular contract, this particular contract would

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6 govern. But otherwise, all of the standard terms of the sugar  
7 charter party were incorporated.

8 In addition --

9 THE COURT: So, looking back at the contract for a  
10 moment, the contract doesn't, in your view, simply say that  
11 there's going to be reimbursement of costs; instead, you're  
12 saying that the contract provides specifically for terms about,  
13 for example, how the vessel is going to be discharged?

14 MS. OROZCO: Yes.

15 THE COURT: And those are provisions between these  
16 parties, not involving the shipowner. They are between these  
17 parties. And they are agreeing as to how the vessel is going  
18 to be discharged and what -- when lay time is going to count  
19 and when it's not going to count; and how the demurrage is  
20 going to be settled; and what the water draft is at the port of  
21 discharge. These are all obligations that the buyer is  
22 guaranteeing, not something that the buyer is just going to pay  
23 costs that somebody else incurs?

24 MS. OROZCO: Yes. I believe -- my position would be,  
25 your Honor, that this is not at all an indemnity provision. If

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1 it was an indemnity provision, I think it would say it was an  
2 indemnity provision.

3 In the case of Aston Agro v. Star Grain, which the  
4 defendant had cited in one of their letters, which is a case of  
5 Judge Daniels, it was a sales contract, and I believe it was  
6 for the sale of wheat, I don't recall off the top of my head.

7 But, in that particular case, the issue before the  
8 court and what the court stated was with respect to the  
9 demurrage obligations in that case, it was not clear under the  
10 contract which party would pay for or incur demurrage.

11 In that case, Judge Daniels found that it may very  
12 well just have been an indemnity provision. But the demurrage  
13 clause in that contract just said demurrage to be calculated in  
14 accordance with the charter party. So at the time of entering  
15 into the contracts in this case, the defendant was very much  
16 aware that it was obligating itself to pay demurrage.

17 In addition, the arbitration decision --

18 THE COURT: Now, again, just to go back to this.

19 MS. OROZCO: Yes.

20 THE COURT: I cited a moment ago various provisions in  
21 the contract that seemed to be of a maritime nature, but it's  
22 not clear to me -- I suspect it's the other way -- it's not  
23 clear to me that those were -- the ones I cited are the -- what  
24 the dispute was about. No one was fighting about whether there  
25 was lay time on a Thursday afternoon, I take it.

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1 So, what exactly -- well maybe they were. There's a  
2 lay time allowance being calculated. There is an effective  
3 demurrage -- on demurrage of rain periods during the discharge.

4 What contract provisions do those disputes fall under?

5 MS. OROZCO: Those disputes fall under the discharge  
6 conditions. And to the extent that they are not outlined  
7 within the discharging conditions of the particular contracts,  
8 then the sugar charter party form would come into play.

9 And at page 2 of the arbitration award in the overview  
10 paragraph, it's clearly stated that Noble, the plaintiff in

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11 this case, their claims are for demurrage which were incurred.  
 12 And Ouest Import, the defendant, admitted that the demurrage  
 13 costs were incurred. But, the dispute was the defendant had  
 14 counterclaims for dead freight and for dispatch -- I'm sorry,  
 15 not dead freight -- dispatch and discharge port fines.

16 So, it wasn't a question of: Do we owe demurrage or  
 17 not? It was a question of how demurrage is calculated, and how  
 18 do we treat lay time periods, how do we treat rain delays, how  
 19 do we treat lack of bills of lading at the discharge port.  
 20 Those were the disputes.

21 Just two more important points. If it was an  
 22 indemnity contract, perhaps the issue would be: You paid the  
 23 charterer -- Noble, you paid the owner too much money and we  
 24 don't think we should indemnify you. But, it's not. It's a  
 25 dispute of how to calculate, when does lay time run.

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1 More importantly, on page 9 at paragraph 25 and page  
 2 10 at paragraph 27 in the arbitration award, the defendant in  
 3 this case relied on charter party case law in London to support  
 4 its positions. So I don't think that it's -- I think that the  
 5 parties were very much aware of the maritime nature of the  
 6 obligations with this particular dispute.

7 And I think that this case is very similar to the  
 8 Noble v. YTS case that I submitted to your Honor, recently  
 9 decided by Judge Preska. I think that these are clearly  
 10 maritime obligations.

11 THE COURT: Okay.

12 Mr. DeMay, any last words?

13 MR. DeMAY: Yes, your Honor.

14 Number one, I disagree that this case is on all fours  
 15 with Judge Preska's decision. If you look at Judge Preska's  
 16 decision, I think on the second page she outlines a number of  
 17 details that were present in those contracts that are not  
 18 present in these contracts.

19 Number two, I believe only four of the six contracts  
 20 actually named the vessel. Two of them do not.

21 Number three, I take issue with the notion that the  
 22 charter party was incorporated. What it says is that, "All of  
 23 the other conditions to be in accordance with the amended  
 24 version of the sugar charter party." And "conditions" in that  
 25 sense has to refer to the caption, which is discharge

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1 conditions.

2 So, once again, all the parties have done is to refer  
 3 to another document as a standard by which they determine their  
 4 own obligations.

5 The notion that the buyer guarantees the minimum water  
 6 draft, again, that's fine if the guarantee is being made  
 7 directly to the vessel owner, where it certainly then would be  
 8 a maritime obligation. But as between two businessmen, a buyer  
 9 and seller of sugar, that means something else. It simply  
 10 means that the buyer says: If the water draft is not 99 feet,  
 11 we'll compensate you for damages suffered as a result of that.  
 12 And the notion that if this were intended to be an indemnity  
 13 provision, they would have said so.

14 This is a businessman's contract. And I think it's  
 15 unreasonable to assume that businessmen would necessarily

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16 phrase their obligations as would an attorney.

17 THE COURT: I understand. I think I'm prepared to  
18 rule.

19 As I said, what's before the court is effectively a  
20 motion by the defendant to vacate an order for the process of  
21 maritime attachment. The underlying dispute concerns a series  
22 of agreements between the plaintiff and defendant for the sale  
23 of sugar. A dispute arose between the parties regarding the  
24 performance of those contracts, and following arbitration a  
25 panel awarded the plaintiff \$674,558 in outstanding demurrage

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1 charges owed by the defendant.

2 The plaintiff then sought this order of maritime  
3 attachment in an attempt to satisfy that judgment which remains  
4 unsatisfied.

5 The defendant contests the existence of federal  
6 admiralty jurisdiction, which is of course a prerequisite to  
7 the applicability of the rules governing maritime attachments.

8 After hearing argument and reviewing the papers  
9 submitted by the parties, for the following reasons the court  
10 denies the defendant's motion to vacate the order for maritime  
11 attachment.

12 Traditionally, the rule was that a federal court could  
13 exercise admiralty jurisdiction only over "contracts, claims,  
14 and services, purely maritime," in nature. That's *Rea v. The*  
15 *Eclipse*, 135 U.S. 599, 608 (1890). However, that rule has  
16 loosened considerably and today mixed contracts, those  
17 containing both maritime and nonmaritime provisions, can be  
18 subject to admiralty jurisdiction in two situations. As set  
19 forth by the Second Circuit in *Folksamerica Reinsurance Company*  
20 *v. Clean Water of New York, Incorporated*, 413 F.3d 307, (Second  
21 Circuit 2005), those situations are, first, where "the  
22 principal objective of a contract is maritime commerce," and  
23 second, where the claim at issue in the dispute, "arises from a  
24 breach of maritime obligations that are severable from the  
25 nonmaritime obligations of the contract." And that quotation

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1 is from page 315 of the opinion.

2 It's clear that the first situation does not apply  
3 here. The contracts in this case deal primarily with the sale  
4 of goods. Each is styled as a "Confirmation of Sale." See  
5 Exhibits 1 to 6 of the plaintiff's letter of July 7, 2008.

6 Each of the contracts sets forth the standard terms  
7 one expects to see in a contract for a sale of goods, including  
8 a buyer, a seller, a price, quantity, and quality.

9 The contracts also set forth the terms of payment.

10 The contracts do, however, specify some details about  
11 shipment. Some indicate shipment dates and others the actual  
12 ships to be used. The contracts specify that "discharging  
13 costs" are to be borne by the buyer. See, for example, Exhibit  
14 1 to the plaintiff's letter of July 7, 2008.

15 But, the contracts are not themselves contracts for  
16 the carriage of goods and they clearly contemplate separate  
17 bills of lading to be negotiated between the seller and a third  
18 party carrier.

19 Materially similar contracts were found not to have  
20 maritime commerce as their principal objective in *Aston*



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21 Agro-Industrial AG v. Star Grain Limited, 2006 U.S. District  
 22 Court, LEXIS 91636, (Southern District of New York,  
 23 December 20, 2006). Star Grain considered contracts for the  
 24 sale of wheat that contained some details about the shipment of  
 25 the wheat such as, "the conditions under which the shipment and  
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1 unloading of the wheat should occur," and how demurrage costs  
 2 were to be calculated. See pages 1 to 2 of this opinion. The  
 3 court held that despite these details, the contracts' "primary  
 4 objective was undoubtedly the sale of wheat," not "the  
 5 transportation of goods at sea," at page 9.  
 6 Similarly, in Shanghai Sinom Import and Export v.  
 7 Exfin (India) Mineral Ore Company, 2006 A.M.C. 2950, (Southern  
 8 District of New York 2006), an oral opinion, this court, that  
 9 is I, considered a contract for the sale of iron ore that also  
 10 included maritime provisions "requiring the ore to be shipped  
 11 by sea and specifying certain requirements regarding the  
 12 conditions for such shipment." 2006 A.M.C. at 2950. Noting the  
 13 dangers of interpreting federal maritime jurisdiction too  
 14 broadly, this court decided it did not have jurisdiction  
 15 because the contract was "essentially a land-based contract for  
 16 the sale of goods," at page 2954.

17 Although the contracts here clearly contemplate  
 18 shipping, the bulk of the contracts are devoted to defining  
 19 terms of sale rather than terms of transport. The fact that  
 20 the movement of the goods over sea is essential to the  
 21 performance of the contract does not by itself make a contract  
 22 maritime. If that were so, then any contract for the sale of  
 23 goods between countries on different continents would become  
 24 maritime law. The court does not find support for so broad an  
 25 interpretation of its maritime jurisdiction. For similar  
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1 reasons, that the contracts for sale of goods incidentally  
 2 specify some terms of transport does not make their principal  
 3 objective a maritime one.  
 4 The second basis for admiralty jurisdiction, however,  
 5 is where the dispute "arises from a breach of maritime  
 6 obligations that are severable from the nonmaritime obligations  
 7 of the contract." That is to say, to the extent that the  
 8 contracts here are mixed contracts, if the dispute concerns  
 9 those parts of the contracts that are maritime in nature, then  
 10 this court has jurisdiction. Because the dispute does concern  
 11 those parts of the contract that are maritime in nature, this  
 12 provides a basis for the court's jurisdiction.  
 13 The dispute here centers on the payment of demurrage  
 14 that resulted from delays in the discharge of ships' cargoes at  
 15 their destination ports. Resolution of the competing claims  
 16 required the arbitration panel to analyze a number of  
 17 obligations under the contracts. These included provisions  
 18 relating to the assignment of discharging costs, conditions for  
 19 the commencement of discharge, the calculation of demurrage  
 20 rates, and the parties' obligations under related bills of  
 21 lading, letters of credit, and a charter party. See, for  
 22 example, the interim final arbitration award, Exhibit 7 to the  
 23 plaintiff's letter of July 7, 2008 at pages 7, 17, 19, 24, 33,  
 24 and many other places.

25 Such obligations fall squarely within the court's  
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1 admiralty jurisdiction. In deciding whether obligations are  
2 maritime in nature, the test is, "whether the subject matter of  
3 the dispute is so attenuated from the business of maritime  
4 commerce that it does not implicate the concerns underlying  
5 admiralty and maritime jurisdiction." That is from Atlantic  
6 Mutual Insurance Company v. Balfour MacLaine International  
7 Limited, 968 F.2d 196, page 200, (Second Circuit 1992).

8 Far from being attenuated from the business of  
9 maritime commerce, discharge of cargo, calculation of  
10 demurrage, bills of lading, and letters of credit are subjects  
11 intimately connected to the business of maritime commerce.  
12 Federal adjudication of disputes over such matters serves the  
13 goals of admiralty jurisdiction in providing "a neutral federal  
14 forum and a uniform body of law to adjudicate rights and  
15 liabilities as they relate to the trafficking of sea-faring  
16 vessels," from the same place in the Atlantic Mutual case.  
17 Consequently, admiralty jurisdiction is warranted over disputes  
18 between the parties arising out of these obligations.

19 Reference to the contract at Exhibit 1 clearly  
20 provides for a variety of obligations that the buyer in this  
21 case undertook, which are not simply obligations to pay but are  
22 obligations to see to certain performance, and that performance  
23 relates to things like how the vessel should discharge, how lay  
24 time should be treated, even what the water draft should be at  
25 the port of discharge, and furthermore, the parties then

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1 incorporate additional provisions from an underlying charter  
2 party.

3 Mr. DeMay argues, as a very well made argument,  
4 indeed, that these are simply conditions of payment. But, of  
5 course, all conditions between commercial parties, maritime and  
6 otherwise, boil down to agreements to pay if the conditions  
7 that are established are not satisfied. And these are no  
8 different in that regard from any other provision that  
9 specifically requires that vessels be discharged in particular  
10 ways. All such provisions boil down to an agreement to pay  
11 damages or pay costs in some way if those conditions are not  
12 met.

13 The question is: what are you paying for? And here,  
14 it seems clear, that what the buyer is agreeing to do is to pay  
15 certain specifically maritime obligations are not met, or to  
16 pay for particular shipping costs, to be calculated in ways  
17 that, quite understandably, are referred to arbitrators with  
18 expertise in admiralty matters, who then proceed to decide the  
19 case by reference to various maritime commercial concepts.

20 Anyone who reads the arbitration agreement, it seems  
21 to me, is forced to the conclusion that what these parties are  
22 disputing in this case is nothing related to the sale of sugar  
23 but is everything related to the proper conduct of the vessel  
24 with respect to discharging the conduct.

25 Now, the parties have cited a number of district court

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1 cases. And, of course, it's worth remembering that none of  
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these cases, whoever cites them and whichever side they seem to fall on, are binding authority in this court. Nevertheless, the court respects the value of consistency and the importance of considering those cases and specifically respects the expertise of the judges who decided them.

So, I have considered those cases. And it seems to me that the holding in *Star Grain*, the principal case on which the defendant relies, is not really to the contrary. That case was similar to this one insofar as the claim there was also for the payment of demurrage. However, as I read the case, the claim in *Star Grain* arose not out of a specific obligation in the contract with regard to demurrage but ultimately from a standard contract term that assigned the risk of loss of goods during transit to the buyer. See page 14 of 2006 U.S. District Court LEXIS 91636.

Because the demurrage was the result of damage to the goods during transit, the dispute centered on this standard nonmaritime contract term and not on parts of the contract that were, "uniquely maritime," quoting from page 12 of the opinion.

Now, it's not entirely clear to me that the uniquely maritime standard applied in *Star Grain* is exactly consistent with the standard laid down by the Second Circuit in *Atlantic Mutual Insurance*, which seems to me to put the burden to some degree -- the presumption in the other direction saying that

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the provisions are not maritime if they are so attenuated from maritime commerce as opposed to that they are only to be considered maritime if they are uniquely maritime.

It may be that the court in *Star Grain* applied a narrower rule of maritime jurisdiction than the Second Circuit law justifies.

But this case is sufficiently different from *Star Grain* that I don't have to decide in any way whether I would decide *Star Grain* the same way as Judge Daniels did. This case concerns obligations that are common and instrumental features of maritime contracts and not terms that are typical features of contracts for the sale of goods generally.

Accordingly, it's hereby ordered that the defendant's motion to vacate this court's April 15, 2008 ex parte order for process of maritime attachment is denied.

Now, Ms. Orozco, one of the things I always wonder about with these maritime attachment cases is when do they end? What typically happens, it seems to me -- and again, I'm hardly an expert in this stuff -- is that a plaintiff brings an action in this court and seeks maritime attachment by way of gaining security, and then doesn't really have any intention of following up the case. Here, the case is decided in some other forum, usually an arbitral forum. And in this case if I have the timing right, the arbitration actually happened in the first place and then this was sought in aid of execution of the

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judgment.

Is this a tempest in a teapot? Do you have money? And if so, how much do you have? And what happens by way of --

MS. OROZCO: Procedurally, we actually have not captured any funds yet. But what the intention would be, would be that in the event we capture funds, we would move to confirm

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7 the award in this court. And once the award is confirmed,  
 8 which we have no reason to believe it would not be confirmed,  
 9 it's a London arbitrating, then we would move to secure any  
 10 security to satisfy that New York judgment.  
 11 THE COURT: But how long does this go on? I don't  
 12 know -- I gather from the fact that Mr. DeMay is here, that the  
 13 defendant exists and has ongoing business and can afford to  
 14 retain a lawyer to engage in this dispute. So maybe some day  
 15 some money will show up in this district.  
 16 But, one thing that has concerned me, both from a  
 17 very, perhaps, pedantic concern for the court's docket, to a  
 18 more substantive concern about the nature of these attachments,  
 19 is that it's one thing to attach property that's here, even if  
 20 that is intangible property. It's another thing to have a sort  
 21 of open-ended order that will attach something someday if it  
 22 should appear when there is no particular reason, other than  
 23 the fact that a lot of money comes through New York, to assume  
 24 that it's ever going to.

25 Now, I've had to deal with this issue in other cases

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1 and it seems to me the Second Circuit law is clear that these  
 2 prospective attachments are valid. It seems to me that the  
 3 underlying Second Circuit cases are ones precisely in which the  
 4 district court issued an order saying you could attach some  
 5 money transfer when nobody actually was aware of a particular  
 6 transfer being there. So, the validity of this I take as  
 7 established by circuit case law, but I don't think, as far as I  
 8 know, that the circuit has addressed: Is this open-ended  
 9 forever, or at what point is it perfect for a court to say:  
 10 But there ain't no property to attach, and there never has  
 11 been, and it's unclear when, if ever, there will be, and why  
 12 don't we just close this up.

13 Now, this one hasn't been pending for very long and I  
 14 don't know that we're close to any point of whatever it might  
 15 be of closing it down. But, do you have any thought or  
 16 suggestion as to when this just becomes ridiculous?

17 MS. OROZCO: I do, your Honor. Actually it's an issue  
 18 that we deal with. Our general rule of thumb, if we have not  
 19 caught any funds after about six to eight months -- depending  
 20 upon what type of information we can find that confirms that  
 21 the defendant is still in business or that they are not in  
 22 business or that there are eight other attachments -- if we  
 23 haven't caught funds after about the six-to-eight-month period,  
 24 we generally recommend to our client that we dismiss without  
 25 prejudice. In the future if you have information; you discover

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1 they are trading, they are liquid, we can revisit, perhaps  
 2 reopening the file. But that is our general recommendation for  
 3 the same reason of it's overwhelming the courts. It's  
 4 overwhelming to us, and it's daily service -- it's throwing  
 5 money -- the client spends money for daily service and they are  
 6 getting nowhere. And if the company is really not trading,  
 7 there's really no point. The attachment is there.

8 It can be -- we've had cases where we've dismissed the  
 9 attachment and then we've gotten information and refiled and  
 10 we've caught money within 30 days, but it's generally -- we do  
 11 put an end to it. We go back to our clients and say, look,

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12 this is -- you know.

13 THE COURT: Well, of course, that's what you do and  
14 you're free to do as you like. The question is --

15 MS. OROZCO: As are you?

16 THE COURT: Well, that's the question. Am I? Is this  
17 solely a matter for my discretion, or are there any rules that  
18 ought to apply here?

19 Now, at this point -- I just said the date, now I'm  
20 forgetting. It was April --

21 MS. OROZCO: April 12 it was issued. I believe we  
22 started serving April 15.

23 THE COURT: So, it's been four months and nothing has  
24 turned up yet. Certainly six months sounds like to me  
25 relatively an outside period unless there is some evidence that

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1 something is likely to happen now.

2 Again, I suppose it's possible that a party could try  
3 to simply avoid New York for a period and then if something  
4 gets vacated resume normal business practices. I doubt that  
5 would be easy to do, but maybe it's possible.

6 And I suppose, further, that absent the process of  
7 daily service and having an open order, you would never really  
8 have any way of knowing whether that's resumed.

9 At any rate, it seems to me that come October this is  
10 going to be vacated anyway if there is not some success in  
11 attaching something. And I don't know any way of dealing with  
12 this kind of problem other than by rule of thumb of that sort.

13 Mr. DeMay, do you have a thought or -- this is a  
14 different issue than what you all came here to talk about,  
15 but --

16 MR. DeMAY: Your honor, I've been on both sides of the  
17 transaction. I take it as a given that no Rule B case would be  
18 allowed to remain open-ended.

19 THE COURT: I should think not.

20 MR. DeMAY: My understanding is that under Rule 4,  
21 there's a 120-day limit for service of process. If the  
22 defendant is one on whom service of process can be made in the  
23 United States, I think that 120-day rule probably would apply  
24 absent good cause. If the defendant is located overseas, my  
25 understanding is the 120-day rule does not strictly apply.

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1 It's up to the court's discretion; may be applicable in a case  
2 where the defendant is located in a western nation where  
3 service can easily be made.

4 But my understanding is that Rule B is essentially  
5 equitable in nature. It's subject to the court's discretion.  
6 The court can limit the attachment; it can vacate an  
7 attachment. So I would read into that, that the court has  
8 inherent power, after a passage of time that the court deems to  
9 be reasonable, to decide that there is no point in continuing,  
10 that the case would have to be dismissed without prejudice.

11 THE COURT: Well, that sounds about right to me. I  
12 think what I've done in the past -- and I don't know whether  
13 there's ever been a particular time -- but once I started  
14 seeing these things piling up on the docket, I did a little  
15 project of just issuing orders saying tell me what's going on.  
16 And it turned out that most of the plaintiffs had attached

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17 something during that period and we just didn't know about it.  
18 So, they weren't totally dormant. But it seems to me that some  
19 sort of time limit is appropriate.

20 And I guess it sounds as if the practice at the bar so  
21 far has been not to include such a time period, an expiration  
22 date in the order of attachment itself. And that makes some  
23 sense. It may be that leaving this to case-by-case issues and  
24 allowing the plaintiff an opportunity to explain why they  
25 think, if they do, that the order should be extended after some

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1 period of time, is the best way to go.

2 But at any rate, what I'm indicating is you can expect  
3 that come October either this will be vacated outright or I'll  
4 be at least asking the plaintiff for some account of is there  
5 any reason they can think of why this should go on. Of course,  
6 it's my expectation that the defendant will say no, it  
7 shouldn't. And barring some new news, this dispute is resolved  
8 now only for the next two months and it may well be that  
9 today's order is largely academic.

10 All right. Thank you very much.

11 MS. OROZCO: Thank you, your Honor.

12 MR. DEMAY: Thank you, your Honor.

13 (Adjourned)

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